EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

IN RE: ETHICON, INC. PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION **THIS DOCUMENT RELATES ONLY TO: [PLAINTIFF] v. ETHICON, INC., et al. CASE NO. 2:12-cv-[XXXXX]**	**Master File No. 2:12-MD-02327** **MDL No. 2327** **JOSEPH R. GOODWIN** **U.S. DISTRICT JUDGE**

ETHICON, INC.'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Defendant Ethicon, Inc. ("Ethicon"), by and through the undersigned counsel, hereby moves to dismiss with prejudice the above-captioned case for failure to timely provide a completed Plaintiff Profile Form in accordance with Pretrial Order #17 ("PTO #17").[1]

BACKGROUND

Pursuant to PTO #17, each plaintiff in MDL No. 2327 must submit a completed Plaintiff Profile Form ("PPF"). *See* PTO #17, ECF No. 281 (Oct. 4, 2012). For any plaintiff whose case was pending in MDL No. 2327 at the time PTO #17 was entered on October 4, 2012, the PPF was to be filed within sixty days of the date of entry of PTO #17, or no later than December 3,

[1] Ethicon is the proper defendant in this matter and has been named a party-defendant in every case currently pending in MDL No. 2327. In addition to Ethicon, some plaintiffs in MDL No. 2327 have named one or more of the following as a co-defendant: Johnson & Johnson; Ethicon LLC; Ethicon Women's Health & Urology (a division of Ethicon that can neither sue nor be sued); and Gynecare, Inc., (a business corporation that no longer exists). To the extent any of these additional entities is named as a co-defendant in the above-referenced case, this motion is filed on behalf of Ethicon and that co-defendant, all of whom are collectively referred to hereafter as "Ethicon."

2012.[2] *See id.* at 1. For any plaintiff whose case became a part of MDL No. 2327 after entry of PTO #17, the PPF was to be filed within sixty days of that plaintiff filing a Short Form Complaint. *See id.* If a plaintiff fails to submit a PPF within the time specified by PTO #17, the "defendants may move immediately to dismiss that plaintiff's case without first resorting to" certain deficiency cure procedures set forth elsewhere in PTO #17. *Id.* at 4.

Plaintiff's case was filed in or transferred to MDL No. 2327 after the entry of PTO #17. Plaintiff's Short Form Complaint was filed on [DATE]. Therefore, under the terms of PTO #17, Plaintiff was required to submit a PPF no later than [SIXTY DAYS LATER]. Plaintiff has yet to file a PPF and has thus failed to comply with PTO # 17.

ARGUMENT

Federal Rule of Civil Procedure 16(f)(1) provides in pertinent part that, "[o]n motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f)(1)(C). Rule 37(b)(2)(A) in turn provides that, when a party "fails to obey an order to provide or permit discovery," the court may "issue further just orders," including "dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(v).

A trial court has broad discretion in applying the sanctions set forth in Rule 37. *See, e.g.*, *Holdren v. Poncove, Inc.*, No. 5:07-cv-00488, 2008 WL 4950146, at *1 (S.D. W. Va. Nov. 18, 2008) (citing *W. Reserve Oil & Gas Co. v. Key Oil, Inc.*, 626 F. Supp. 948, 949 (S.D. W. Va. 1986)). The Fourth Circuit has previously held that a plaintiff's willful disregard of a district court's pretrial order establishing a discovery timetable warranted preclusion of evidence critical

[2] A carte blanche extension was granted extending the due date to December 13, 2012, for all plaintiffs who made such a request.

to the plaintiff's case, resulting in dismissal of suit. *See Rabb v. Amatex Corp.*, 769 F.2d 996, 1000 (4th Cir. 1985). Moreover, dismissal of a case is available as a remedy for failing to answer interrogatories or to respond to other discovery such that it becomes impossible to determine the merits of a claim. *See Mut. Fed. Sav. & Loan Ass'n v. Richards & Assoc., Inc.*, 872 F.2d 88, 92-93 (4th Cir. 1989); *see also Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640-42 (1976).

Here, Plaintiff's failure to abide by the requirements of PTO #17 warrants dismissal of this case with prejudice. The information contained in a completed PPF, as well as the medical records that a plaintiff must submit with the completed PPF, are essential to the defense of this action. Indeed, in multidistrict proceedings, the exchange of profile forms such as the PPF is the initial step in the bellwether selection process. *See* Honorable Eldon E. Fallon *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2344 (2008). Profile forms give the attorneys some knowledge, however limited, about the individual cases in the MDL, thereby allowing them to make educated selections as to which cases are appropriate for additional case-specific discovery as part of the discovery pool. Potential bellwether cases are later selected from this discovery pool, meaning that a case the parties do not select for the discovery pool will not be one of the initial bellwethers.

In short, without a completed PPF, it is simply impossible for Ethicon to assess the merits of a claim and to determine which cases are appropriate bellwether candidates. *See Gaydos v. Guidant Corp. (In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.)*, 496 F.3d 863, 867 (8th Cir. 2007) ("Given the time pressure on a defendant that must investigate the claims of nearly 1,400 plaintiffs, we consider the danger of prejudice substantial [from failure to produce plaintiff fact sheet]."). This Court recognized as much, setting precise deadlines by which completed PPFs were to be submitted and warning that failure to comply with these deadlines would warrant an immediate motion to dismiss by the defendants. Because Plaintiff failed to timely submit a completed PPF, as required by PTO #17, dismissal of the above-referenced case is appropriate.

CONCLUSION

For the reasons set forth above, Ethicon respectfully requests that the Court enter an Order dismissing the above-captioned Plaintiff's claims with prejudice for failure to provide a completed Plaintiff Profile Form, as required by PTO #17.

Respectfully submitted,

ETHICON, INC. AND
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CERTIFICATE OF SERVICE

I, David B. Thomas, certify that on _______________, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this MDL.

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